Supreme Court, U.S.
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Supreme Court of the United States

R.J. REYNOLDS TOBACCO COMPANY, *ET AL.*,

Petitioners,

v.

STATE OF MONTANA *EX REL.* STEVE BULLOCK,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Montana

PETITION FOR WRIT OF CERTIORARI

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January 29, 2010

QUESTION PRESENTED

Whether the Montana Supreme Court violated the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, by refusing to compel arbitration of a dispute that courts of 47 other States and Territories have held arbitrable under the plain terms of the nationwide Master Settlement Agreement between tobacco companies and settling States.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners hereby state as follows:

Petitioner R. J. Reynolds Tobacco Company is a subsidiary of Reynolds American Inc., and no other publicly held company owns 10% or more of its stock.

Petitioner Philip Morris USA Inc. is a subsidiary of Altria Group, Inc., and no other publicly held company owns 10% or more of its stock.

Petitioner Lorillard Tobacco Company is a subsidiary of Lorillard, Inc., and no other publicly held company owns 10% or more of its stock.

Petitioner Commonwealth Brands, Inc. is a subsidiary of CBHC, Inc. Imperial Tobacco Group plc indirectly owns more than 10% of the stock of Commonwealth Brands, Inc.

Petitioner Compania Industrial de Tabacos Monte Paz, SA has no parent company and no publicly held company owns 10% or more of its stock.

Petitioner Daughters & Ryan has no parent company and no publicly held company owns 10% or more of its stock.

Petitioner House of Prince A/S is a subsidiary of British American Tobacco, and no other publicly held company owns 10% or more of its stock.

Petitioner Japan Tobacco International U.S.A. Inc. is a subsidiary of JT International Holding B.V. Japan Tobacco Inc. indirectly owns more than 10% of the stock of Japan Tobacco International U.S.A. Inc.

Petitioner King Maker Marketing Inc. is a subsidiary of ITC Ltd, and no other publicly held company owns 10% or more of its stock.

Petitioner Kretek International, Inc. has no parent company and no publicly held company owns 10% or more of its stock.

Petitioner Liggett Group LLC is a subsidiary of VGR Holding Inc. Vector Group Ltd. indirectly owns 10% or more of the stock of Liggett Group LLC.

Petitioner Peter Stokkebye Tobaksfabrik, A/S is a subsidiary of Orlik Tobacco Company A/S, and no other publicly held company owns 10% or more of its stock.

Petitioner Santa Fe Natural Tobacco Company is a subsidiary of Reynolds American Inc., and no other publicly held company owns 10% or more of its stock.

Petitioner Sherman's 1400 Broadway N.Y.C. Inc. is a subsidiary of Sherman Group Holdings LLC, and no publicly held company owns 10% or more of its stock.

Petitioner Top Tobacco L.P. has no parent company, and no publicly held company owns 10% or more of its stock.

Petitioner Von Eicken Group has no parent company, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

INTRODUCTION 1

OPINIONS BELOW 5

JURISDICTION 5

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS 5

STATEMENT OF THE CASE 8

A. Background 8

B. Procedural History 11

REASON FOR GRANTING THE WRIT 15

The Montana Supreme Court Violated The Federal Arbitration Act By Refusing To Compel Arbitration Of A Dispute That Courts Of 47 Other Jurisdictions Have Held Arbitrable Under The Plain Terms Of The Nationwide Tobacco Litigation Master Settlement Agreement. 15

CONCLUSION 32

APPENDIX CONTENTS

Opinion of the Montana Supreme Court,
August 5, 2009 ..... 1a

Order of the Montana Supreme Court
Denying Rehearing,
September 10, 2009 ..... 28a

Opinion of the Montana District Court,
March 6, 2007 ..... 32a

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama v. Lorillard Tobacco Co.,
1 So.3d 1 (Ala. 2008).....19, 24, 25, 26, 27, 28

Alaska v. Philip Morris Inc.,
No. 1JU-97-915 CI, 2007 WL 6561051
(Alaska Super. Ct. Feb. 5, 2007).....19

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995).....15

Arizona v. Philip Morris Inc.,
No. 1CA-SA 07-0083
(Ariz. Ct. App. May 24, 2007).....19

Arkansas v. American Tobacco Co.,
No. IJ1997-2982, 2006 WL 5400237
(Ark. Cir. Ct. Nov. 29, 2006),
pet. denied, No. 07-17 (Ark. 2007).....19

Bobby v. Van Hook,
130 S. Ct. 13 (2009) (*per curiam*).....32

Buckeye Check Cashing, Inc. v. Cardegna,
546 U.S. 440 (2006).....15, 17, 18

Casarotto v. Lombardi,
886 P.2d 931 (Mont. 1994),
vacated, 515 U.S. 1129 (1995),
on remand, 901 P.2d 596 (Mont. 1995),
rev'd, 517 U.S. 681 (1996).....30

Collins & Aikman Prods. Co. v. Building Sys., Inc.,
58 F.3d 16 (2d Cir. 1995).....18

Colorado v. R.J. Reynolds Tobacco Co.,
No. 97 CV 3432
(Colo. Dist. Ct. July 19, 2006) 19

Connecticut v. Philip Morris, Inc.,
905 A.2d 42 (Conn. 2006) 19, 25, 27

Corcoran v. Levenhagen,
130 S. Ct. 8 (2009) (*per curiam*) 32

Delaware v. Philip Morris USA, Inc.,
No. 657, 2006, 2007 WL 1138472
(Del. Apr. 17, 2007).....19

District of Columbia v. Philip Morris USA, Inc.,
No. 2006 CA 003176 B, 2006 WL 6273143
(D.C. Super. Ct. Sept. 26, 2006) 19

Doctor's Assocs., Inc. v. Casarotto,
517 U.S. 681 (1996).....15, 17, 18, 30

Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.,
118 F.3d 619 (8th Cir. 1997) 18

Georgia v. Philip Morris USA, Inc.,
No. 2006CV116128
(Ga. Super. Ct. Feb. 4, 2008).....19

Hawaii v. Philip Morris USA,
No. 06-1-0695-04 KSSA
(Haw. Cir. Ct. Aug. 2, 2006).....20

Idaho v. Philip Morris, Inc.,
No. CV OC 97 03239D, 2006 WL 5400238
(Idaho Dist. Ct. June 30, 2006),
leave to appeal denied,
No. 99567 (Idaho 2006) 20

Illinois v. Lorillard Tobacco Co.,
865 N.E.2d 546 (Ill. App. Ct.),
appeal denied,
875 N.E.2d 1119 (Ill. 2007) 20, 25, 26

In re Tobacco Cases,
No. JCCP 4041 (Cal. Super. Ct. Aug. 23, 2006),
pet. denied, No. JCCP 4041
(Cal. Ct. App. Dec. 5, 2006) 19

Indiana v. Philip Morris Tobacco Co.,
879 N.E.2d 1212 (Ind. Ct. App.),
transfer denied,
898 N.E.2d 1217 (Ind. 2008) 20, 24, 27, 29

Iowa v. Philip Morris USA, Inc.,
No. CL 71048, 2006 WL 5345156
(Iowa Dist. Ct. Aug. 16, 2006),
appeal dismissed, No. 06-1486
(Iowa Feb. 16, 2007) 20

Kansas v. R.J. Reynolds Tobacco Co.,
No. 96-CV-919, 2007 WL 5416536
(Kan. Dist. Ct. July 9, 2007).....20

Kentucky v. Brown & Williamson Tobacco Corp.,
244 S.W.3d 116 (Ky. Ct. App. 2007),
review denied,
No. 2007-SC-0893-D (Ky. Feb. 13, 2008).....20

Kloss v. Edward D. Jones & Co.,
54 P.3d 1 (Mont. 2002) 30, 32

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001).....1, 27

Louisiana v. Philip Morris, USA, Inc.,
982 So.2d 296 (La. Ct. App.),
writ denied,
992 So.2d 942 (La. 2008) 20, 25, 26, 27

Maine v. Philip Morris, Inc.,
928 A.2d 782 (Me. 2007) 20

Martz v. Beneficial Mont., Inc.,
135 P.3d 790 (Mont. 2006).....31

Maryland v. Philip Morris Inc.,
944 A.2d 1167 (Md. Ct. Spec. App.),
cert. denied,
949 A.2d 653 (Md. 2008)...20, 24, 25, 26, 27, 29

Massachusetts v. Philip Morris Inc.,
864 N.E.2d 505 (Mass. 2007) .21, 24, 26, 27, 28

Mastrobuono v. Shearson Lehman Hutton, Inc.,
514 U.S. 52 (1995) 15, 17

Michigan v. Fisher,
130 S. Ct. 546 (2009) (*per curiam*) 32

Michigan v. Philip Morris USA, Inc.,
No. 273665, 2007 WL 1651839
(Mich. Ct. App. June 7, 2007),
appeal denied,
742 N.W.2d 118 (Mich. 2007) 21

Missouri v. American Tobacco Co., Inc.,
No. 22972-01465, 2007 WL 6509213
(Mo. Cir. Ct. Jan. 22, 2007) 21

Mitsubishi Motors Corp. v.
Soler Chrysler-Plymouth, Inc.,
473 U.S. 614 (1985).....13, 15, 17, 27

Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,
460 U.S. 1 (1983) 15, 16, 17

Nebraska v. R.J. Reynolds Tobacco Co.,
746 N.W.2d 672 (Neb. 2008).....21, 25

Nevada v. Philip Morris USA,
199 P.3d 828 (Nev. 2009).....21, 25, 28

New Hampshire v. Philip Morris USA, Inc.,
927 A.2d 503 (N.H. 2007) 21, 24, 26

New Jersey v. Philip Morris USA, Inc.,
No. C-103-06, 2006 WL 6000399
(N.J. Super. Ct. 2006),
appeal denied, No. 62,087
(N.J. Super. Ct. App. Div. Dec. 4, 2007) 21

New Mexico v. American Tobacco Co.,
194 P.3d 749 (N.M. Ct. App. 2008) 21, 25, 28

New York v. Philip Morris Inc.,
838 N.Y.S.2d 460 (N.Y. 2007).....21, 26

North Carolina v. Philip Morris USA, Inc.,
666 S.E.2d 783 (N.C. Ct. App. 2008),
writ denied,
676 S.E.2d 54 (N.C. 2009) 21, 24, 25

North Dakota v. Philip Morris, Inc.,
732 N.W.2d 720 (N.D. 2007).....21, 26, 28

Ohio v. Philip Morris, Inc.,
No. 06AP-1012, 2008 WL 2854536
(Ohio Ct. App. July 24, 2008),
leave to appeal denied,
898 N.E.2d 969 (Ohio 2008) 22

Oklahoma v. R.J. Reynolds Tobacco Co.,
No. CJ-96-1499, 2007 WL 6509215
(Okla. Dist. Ct. Jan. 29, 2007),
appeal dismissed, No. 104,518 (Okla. 2007)..22

Oregon v. Philip Morris USA,
No. 0604-04252, 2006 WL 6273150
(Or. Cir. Ct. Aug. 29, 2006) 22

Pennsylvania v. Philip Morris USA, Inc.,
No. 2443, 2006 WL 6288185
(Pa. Ct. Com. Pl. Dec. 12, 2006),
appeal denied,
951 A.2d 265 (Pa. 2008) 22

Porter v. McCollum,
130 S. Ct. 447 (2009) (*per curiam*) 32

Presley v. Georgia,
130 S. Ct. __, 2010 WL 154813
(U.S. Jan. 19, 2010) (*per curiam*) 32

Preston v. Ferrer,
128 S. Ct. 978 (2008) 15, 17

Puerto Rico v. Brown & Williamson,
No. 97-1910, 2007 WL 2844272
(D.P.R. Sept. 26, 2007) 22

Rhode Island v. Brown & Williamson Tobacco Corp.,
No. 97-3058, 2007 WL 1100077
(R.I. Super. Ct. Mar. 27, 2007) 22

South Carolina v.
Brown & Williamson Tobacco Corp.,
No. 97-CP-40-1686
(S.C. Ct. Com. Pl. Apr. 27, 2007) 22

South Dakota v. R.J. Reynolds Tobacco Co.,
No. 06-161, 2006 WL 6273153
(S.D. Cir. Ct. Oct. 2, 2006),
appeal dismissed, No. 24311
(S.D. Jan. 5, 2007) 22

Southland Corp. v. Keating,
465 U.S. 1 (1984) 15, 16, 17

Tennessee v. Brown & Williamson Tobacco Corp.,
No. 98-3776-1, 2006 WL 5345521
(Tenn. Ch. Ct. Dec. 7, 2006),
leave to appeal denied,
No. M2007-00476-COA-R9-CV
(Tenn. Ct. App. Mar. 16, 2007).....22

Utah v. R.J. Reynolds Tobacco Co.,
No. 2:96-CV-0829
(Utah Dist. Ct. Dec. 15, 2006) 23

Vaden v. Discover Bank,
129 S. Ct. 1262 (2009) 29

Vermont v. Philip Morris USA Inc.,
945 A.2d 887 (Vt. 2008) 23, 26, 28

Virginia v. Brown & Williamson Tobacco Corp.,
No. HJ-2241, 2006 WL 6273154
(Va. Cir. Ct. Aug. 9, 2006),
leave to appeal denied,
No. 062245 (Va. Feb. 21, 2007) 23

Volt Info. Scis., Inc. v.
Board of Trs. of Leland Stanford Jr. Univ.,
489 U.S. 468 (1989).....16, 17

Washington v. Philip Morris USA,
No. 06-2-13262-9SEA, 2006 WL 6273155
(Wash. Super. Ct. Sept. 28, 2006),
appeal dismissed, No. 59036-7-1
(Wash. Ct. App. Feb. 21, 2007).....23

West Virginia v. American Tobacco Co.,
681 S.E.2d 96 (W. Va. 2009).....23, 26, 27

Wisconsin v. Philip Morris Inc.,
No. 97-CV-0328, 2007 WL 6509259
(Wis. Cir. Ct. Mar. 14, 2007) 23

Wong v. Belmontes,
130 S. Ct. 383 (2009) (*per curiam*) 32

Wyoming v. Philip Morris USA Inc.,
No. 26718
(Wyo. Dist. Ct. Jan. 8, 2007) 23

Statutes

28 U.S.C. § 1257(a).....5

9 U.S.C. § 2 .....5, 11, 16

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The War Against Arbitration in Montana,
66 Mont. L. Rev. 139 (2005) 29, 30, 31, 32

Neesemann, Carroll E.,
Montana Court Continues Its Hostility to Mandatory Arbitration,
58-APR Disp. Resol. J. 22 (2003) 31

Quick, Bryan L.,
Keystone, Inc. v. Triad Systems Corporation: Is The Montana Supreme Court Undermining The Federal Arbitration Act?,
63 Mont. L. Rev. 445 (2002) 31

Reuben, Richard C.,
Western Showdown: Two Montana Judges Buck the U.S. Supreme Court,
ABA J., Oct. 1996 30

INTRODUCTION

This case involves the "landmark" 1998 Master Settlement Agreement (MSA) between more than 40 tobacco companies and the governments of 46 of the 50 States, including Montana, and several Territories. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 533 (2001). The MSA imposed an array of marketing and other restrictions on the settling companies, many of which could not constitutionally have been imposed by either legislation or regulation. It also required the companies to pay the States billions of dollars annually in perpetuity based on their nationwide tobacco sales—sums that the States have estimated at *$206 billion* over the first 25 years alone.

The MSA requires each settling company to make a single nationwide payment every year that is calculated and allocated by a single nationwide Independent Auditor. The MSA provides that the Auditor shall calculate and allocate such payments by starting with an agreed base and then applying various adjustments. One such adjustment reduces the settling companies' payment obligations if (1) they lose more than a specified market share to their non-settling competitors in any given year, and (2) the MSA is a "significant factor" contributing to that loss. The Agreement specifies, however, that a State may avoid its share of any such reduction by demonstrating that it has "diligently enforced" a "Qualifying Statute" imposing similar payment obligations on non-settling tobacco companies. If a State satisfies these conditions, its share of the reduction is reallocated among the other States that do not so qualify. Thus, a "diligent enforcement"

determination as to any one State directly affects the payments due to every other State.

Given the obvious potential for disputes over this payment and allocation scheme, and the need for uniform nationwide resolution of such disputes, the MSA includes a broad arbitration provision requiring arbitration of such disputes by a panel of three former federal judges. In relevant part, the provision requires arbitration of "[a]ny dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor," specifically including "the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations" described in the Agreement. The provision further confirms that the Federal Arbitration Act (FAA) shall govern any such arbitration.

This dispute arises out of the settling companies' request for a reduction, totaling more than *$1.1 billion*, in their payments for 2003. In that year, the settling companies lost more than the requisite market share to their non-settling competitors, and a Nobel-laureate economist jointly selected by the parties determined that the MSA was a "significant factor" contributing to that loss. Under these circumstances, the MSA provides that an adjustment "shall apply," and directs the Auditor to allocate that adjustment among the States.

At the urging of the States, however, the Auditor denied the adjustment on the ground that each State had enacted a "Qualifying Statute" and should be *presumed* to have "diligently enforced" it. As a consequence, the Auditor determined that the

companies were not entitled to any payment reduction for 2003.

The companies challenged the Auditor's determination and sought to arbitrate the "diligent enforcement" issue pursuant to the MSA's arbitration provision. Each of the 46 settling States (plus the District of Columbia and Puerto Rico), however, refused to arbitrate, asserting that this issue falls outside the MSA's arbitration provision and thus must be litigated separately in the courts of each State. Courts in 47 of the 48 affected jurisdictions rejected this position, holding that the plain language of the MSA requires arbitration of the "diligent enforcement" issue, along with all other issues related to the Auditor's decision to deny the NPM Adjustment.

The decision below is the lone outlier: a divided Montana Supreme Court held that a determination of "diligent enforcement" under the MSA does not fall within the scope of the MSA's arbitration provision, and thus must be resolved in court. That holding—rendered *after* the courts of 47 other jurisdictions, including 20 appellate courts, held that this dispute *does* fall within the scope of the MSA's arbitration provision—turns the FAA on its head. That statute requires both federal and state courts to enforce arbitration provisions according to their terms, and establishes a substantive federal policy in *favor* of arbitration. Here, as underscored by the lopsided conflict between the Montana Supreme Court and the courts of *every other jurisdiction in the Nation* to have decided this precise issue, a dispute over "diligent enforcement" under the MSA clearly falls within the plain language of the MSA's broad

arbitration provision. And this conflict arises under *federal*, not *state*, law: where, as here, a dispute falls within the plain terms of an arbitration provision, the FAA requires a court to enforce that provision. If the federal substantive policy favoring arbitration means anything, it means that state courts are not free to interpret arbitration provisions as they please, but must enforce such provisions by their terms and resolve any doubts in favor of arbitrability. By refusing to do so here, notwithstanding the contrary rulings of the other 47 jurisdictions to have addressed this precise issue, the Montana Supreme Court flouted federal law.

This petition calls upon this Court to vindicate the integrity and supremacy of federal law. Given that the courts of 47 other jurisdictions have concluded that the very dispute at issue here is subject to arbitration, it is hard to imagine a better vehicle for reminding the Montana Supreme Court—which, in recent years, has effectively rendered that State an "arbitration free" zone—of its obligations under federal law. And the arbitration issue presented here is particularly consequential, because the decision below undercuts a landmark agreement between the Nation's major tobacco companies (and many smaller companies) and virtually every State and Territory involving the payment and allocation of billions of dollars and the imposition of historic restrictions on tobacco marketing and advertising. If ever there were a case in which it is imperative for this Court to ensure compliance with the FAA, this is it. Accordingly, petitioners respectfully request that this Court grant the petition and either summarily reverse the decision below or set this case for plenary consideration.

OPINIONS BELOW

The Montana Supreme Court's decision is reported at 217 P.3d 475 and 352 Mont. 30, and reprinted in the Appendix ("App.") at 1-27a. The Montana Supreme Court's unreported order denying rehearing is reprinted at App. 28-31a. The Montana district court's unreported decision is reprinted at App. 32-40a.

JURISDICTION

The Montana Supreme Court rendered its decision on August 5, 2009, App. 1a, and denied a timely petition for rehearing on September 10, 2009, App. 28a. On December 2, 2009, Justice Kennedy extended the time within which to file this petition until February 5, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY AND CONTRACTUAL PROVISIONS

Section 2 of the Federal Arbitration Act provides in pertinent part:

> A written provision in ... a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2.

The Master Settlement Agreement provides in relevant part:

> **Allocation among Settling States of NPM Adjustment for Original Participating Manufacturers.**
>
> (A) The NPM Adjustment set forth in subsection (d)(1) shall apply to the Allocated Payments of all Settling States, except as set forth below.
>
> (B) A Settling State's Allocated Payment shall not be subject to an NPM Adjustment: (i) if such Settling State continuously had a Qualifying Statute (as defined in subsection (2)(E) below) in full force and effect during the entire calendar year immediately preceding the year in which the payment in question is due, and diligently enforced the provisions of such statute during such entire calendar year; or (ii) if such Settling State enacted the Model Statute (as defined in subsection (2)(E) below) for the first time during the calendar year immediately preceding the year in which the payment in question is due, continuously had the Model Statute in full force and effect during the last six months of such calendar year, and diligently enforced the provisions of such statute during the period in which it was in full force and effect.
>
> ***
>
> (E) A "Qualifying Statute" means a Settling State's statute, regulation, law and/or rule ... that effectively and fully neutralizes the cost disadvantages that the Participating

> Manufacturers experience vis-à-vis Non Participating Manufacturers within such Settling State as a result of the provisions of [the Master Settlement Agreement].

Master Settlement Agreement § IX(d)(2).

> **Order of Application of Allocations, Offsets, Reductions and Adjustments**. The payments under this Agreement shall be calculated as set forth below.
>
> ***
>
> *Sixth*: the NPM Adjustment shall be applied ... pursuant to subsections IX(d)(1) and (d)(2)....

Master Settlement Agreement § IX(j).

> **Resolution of Disputes.** Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge .... The arbitration shall be governed by the United States Federal Arbitration Act.

Master Settlement Agreement § XI(c).

STATEMENT OF THE CASE

A. Background

The MSA resolved one of the major public policy controversies of the past generation: the responsibility of tobacco companies for health care costs that have been associated with smoking. Instead of litigating that issue in court, the settling States and tobacco companies chose to resolve their differences through the MSA. Under that Agreement, the settling States released their claims against the settling companies (the Participating Manufacturers or PMs), and the PMs in return agreed to make substantial annual payments in perpetuity based upon their nationwide cigarette sales (MSA § IX), and to abide by a variety of marketing restrictions and other obligations (MSA §§ III-VI).[1]

Under the MSA, a single nationwide Independent Auditor determines the PMs' yearly nationwide payment obligations and allocates those payments among the settling States using previously determined "Allocable Shares." MSA § II(f). PMs do not owe any individual State any specific amount of money, and do not make payments to individual States. Rather, each PM makes a single, nationwide payment that the Auditor then allocates among the States. MSA §§ IX(a), (c).

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[1] The entire MSA is available online at http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/1109185724_1032468605_cigmsa.pdf.

Because the obligations imposed on the PMs put them at a disadvantage with respect to their non-settling competitors, the MSA includes a mechanism to reduce the PMs' payment obligations if (1) the PMs lose a specified market share to non-settling companies (Non-Participating Manufacturers or NPMs) in any given year, and (2) the PMs' obligations under the MSA are a "significant factor" contributing to that loss. MSA § IX(d), (j).

The Agreement further provides that a State may avoid the allocation of any such reduction (or "NPM Adjustment") to its annual payment by enacting and "diligently enforcing" a "Qualifying Statute" imposing obligations upon NPMs that are similar to those the MSA places on PMs. MSA § IX(d)(2)(B). If a State demonstrates that it enacted and "diligently enforced" a Qualifying Statute, the Auditor must reallocate that State's share of the NPM Adjustment among other States that do not so demonstrate. MSA § IX(d)(2)(C). Thus, a "diligent enforcement" determination as to any one State directly impacts the annual payments received by every other State.

Section XI(a)(1) of the MSA provides that the Auditor shall make all calculations and determinations necessary to determine the payments due under the MSA, including the amount of any adjustments and their allocation among PMs and settling States. MSA § XI(a)(1). Section IX(j), in turn, specifies the manner in which payments "shall be calculated," including thirteen specific steps the Auditor must follow in applying various offsets, reductions, and adjustments to the base payment. MSA § IX(j). The sixth step in this calculation specifies that the "NPM Adjustment shall be applied

... pursuant to subsections IX(d)(1) and (d)(2) ...." *Id.* Section IX(d)(1), in turn, sets forth the conditions for application of the NPM Adjustment, and § IX(d)(2) sets forth how that Adjustment must be allocated according to which States enacted and "diligently enforced" Qualifying Statutes. The Auditor is therefore required to determine with respect to each annual payment whether the NPM Adjustment applies, and, if so, how it is to be allocated among the States. *See* MSA §§ IX(d)(1), XI.

Consistent with the MSA's imposition of a single, nationwide payment obligation, the Agreement requires that "[a]ny dispute, controversy or claim arising out of or relating to" the Auditor's calculations and determinations—specifically including "any dispute concerning the operation or application" of the adjustments and allocations—"shall be submitted to binding arbitration" before a panel of three former federal judges:

> (c) **Resolution of Disputes**. Any dispute, controversy or claim arising out of or relating to calculations performed by, or any determinations made by, the Independent Auditor (including, without limitation, any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j) or subsection XI(i)) shall be submitted to binding arbitration before a panel of three neutral arbitrators, each of whom shall be a former Article III federal judge.

MSA § XI(c). Although the FAA on its face governs the enforcement of this provision—the MSA is self-

evidently "a contract evidencing a transaction involving commerce," 9 U.S.C. § 2—the parties underscored their intention to be bound by the FAA by specifying in the Agreement that "[t]he arbitration shall be governed by the United States Federal Arbitration Act." MSA § XI(c).

B. Procedural History

This dispute arises out of the Auditor's refusal to apply an NPM Adjustment to the PMs' annual payments to reflect a loss of market share to NPMs in 2003. In March 2004, the Auditor found that the PMs had lost more than the requisite market share to the NPMs, and in March 2006, an independent economic consulting firm jointly selected by the parties (Brattle Group and Nobel laureate Daniel McFadden) found that the MSA was a "significant factor" contributing to that loss. Because the MSA provides that the Auditor "shall apply" the NPM Adjustment when these conditions are satisfied, MSA § IX(d)(1)(C), the PMs formally requested such an adjustment (worth approximately $1.1 billion) to their next annual payment, due in April 2006.

In response, Montana and the other States urged the Auditor to reject the PMs' request on the ground that the Auditor should simply *presume* that each State had "diligently enforced" a Qualifying Statute. Over the PMs' objection, the Auditor agreed.

The PMs demanded arbitration of the parties' dispute concerning the applicability and allocation of the 2003 NPM Adjustment, including the "diligent enforcement" issue. Each of the 46 States that are parties to the MSA (as well as the District of Columbia and Puerto Rico), however, took the position that "diligent enforcement" fell outside the

MSA's arbitration provision and must be litigated in its individual state courts rather than the nationwide arbitration. The PMs moved to compel arbitration in each of these States and Territories, including Montana.

The courts of 47 of these 48 jurisdictions, including 20 appellate courts, agreed with the PMs that any dispute over "diligent enforcement" is subject to arbitration under the MSA. So did the Montana district court, which granted the PMs' motion to compel arbitration. *See* App. 32-40a. As that court explained, a dispute over "diligent enforcement" necessarily "arises out of or relates to" the Auditor's payment "determinations" and "calculations." App. 39-40a. In particular, "the issue of whether 'diligent enforcement' has occurred is necessarily linked to whether the NPM Adjustment applies," which in turn is "one of the major adjustments the Auditor is to determine under the MSA." App. 39a. And the arbitration clause further confirms that point by specifically requiring arbitration of all disputes arising out of or relating to "the operation or application" of "the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j)," which in turn provides for the NPM Adjustment, including its allocation to States that do not demonstrate "diligent enforcement" of a "Qualifying Statute." App. 38-39a. Thus, the Montana district court concluded, "it is clear that the current dispute concerning the Auditor's determination not to apply the 2003 NPM Adjustment ... is a matter for arbitration." App. 39a.

Without hearing oral argument, a divided Montana Supreme Court reversed. The majority

held that the MSA requires arbitration "only" of determinations "actually 'performed' or 'made'" by the Auditor. App. 12-16a; *see also* App. 16-17a ("When the arbitration provision is read as a whole, it is clear that the parties intended to arbitrate *only* those disputes which involve calculations performed or determinations made by the Independent Auditor.") (emphasis added). The majority did not reconcile this interpretation with the MSA's plain language, which requires arbitration not only of disputes concerning the Auditor's "determinations" and "calculations," but also those "arising out of or relating to" such determinations and calculations, "including without limitation any disputes concerning the operation or application of any of" the MSA's "adjustments" and "allocations." Although all 47 other jurisdictions to address this dispute had interpreted this precise language to require arbitration of this precise dispute by the time the Montana Supreme Court ruled, the majority summarily dismissed those decisions on the ground that this was purely an issue of Montana law. The majority did not address the FAA, or the PMs' argument that the plain language of the arbitration provision required arbitration as a matter of *federal* law.

Justice Rice dissented. *See* App. 21-27a. He first criticized the majority for "ignor[ing]" this Court's FAA decisions, "which concretely establish an approach strongly favoring arbitration." App. 21a (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)); *see also id.* ("The decision in this case should not be made without consideration of the federal ... polic[y] favoring arbitration."). Turning to the MSA's

language, Justice Rice noted that the MSA's arbitration clause is not limited to appeals of determinations "actually 'performed' or 'made'" by the Auditor. Rather, the MSA requires arbitration of any matter "arising out of or relating to" such determinations. App. 22-26a. Justice Rice observed that this was a "critical phrase" that had been "interpreted nationally" to require arbitration of the dispute here because a State's claim of "diligent enforcement" was inextricably "related to" the Auditor's refusal to apply the 2003 NPM Adjustment. App. 24-25a. Justice Rice further observed that "the arbitration provision incorporates by reference [to subsection IX(j)] the very provisions out of which the dispute in this case arises," because "[s]ubsection IX(j) provides that 'the NPM Adjustment shall be applied ... pursuant to subsections IX(d)(1) and (d)(2),' and, in turn, subsection IX(d)(2) is the provision which establishes 'diligent enforcement' and the Settling States' exemption." App. 23a.

Petitioners sought rehearing, and again emphasized the FAA's substantive federal presumption in favor of arbitration. The Montana Supreme Court denied the petition without responding to (or even acknowledging) petitioners' federal arguments. App. 28-31a.

This petition follows.

REASON FOR GRANTING THE WRIT

The Montana Supreme Court Violated The Federal Arbitration Act By Refusing To Compel Arbitration Of A Dispute That Courts Of 47 Other Jurisdictions Have Held Arbitrable Under The Plain Terms Of The Nationwide Tobacco Litigation Master Settlement Agreement.

This petition concerns the integrity and supremacy of federal law. The FAA establishes a substantive federal policy in favor of arbitration, which requires both federal and state courts to enforce arbitration agreements according to their terms, and to resolve any doubts in *favor* of arbitration. *See, e.g.*, *Preston v. Ferrer*, 128 S. Ct. 978, 981, 983 & n.2 (2008); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-45 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *Mitsubishi*, 473 U.S. at 625-26; *Southland Corp. v. Keating*, 465 U.S. 1, 10-16 (1984); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). The decision below squarely conflicts with this federal law, and with the decisions of the other 47 jurisdictions that have addressed the precise issue presented here. And it is hard to overstate the practical implications of that decision, which concerns the operation of a landmark nationwide agreement involving the payment and allocation of *billions* of dollars annually. If a state court can disregard federal arbitration law with respect to this landmark nationwide agreement, then a state court

can disregard federal arbitration law with respect to any agreement. Indeed, this decision is only the latest in an ongoing series of decisions by the Montana Supreme Court that, for all intents and purposes, has rendered the FAA a dead letter in that State.

The FAA provides that, as a matter of *federal* law, an arbitration provision in any contract involving commerce "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Thus, while "the interpretation of private contracts is ordinarily a question of state law," *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989), the interpretation of an arbitration agreement is ultimately "a question of substantive federal law," *Southland*, 465 U.S. at 12; *see also Moses H. Cone*, 460 U.S. at 24 (federal law "governs" the "arbitrability of the dispute" under the FAA).

The FAA thus imposes several substantive federal constraints on courts called upon to interpret and enforce arbitration provisions. *First*, it "requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Volt*, 489 U.S. at 478; *see also id.* at 476 ("[T]he federal policy is ... to ensure the enforceability, according to their terms, of private agreements to arbitrate."); *id.* at 485-87 (Brennan, J., dissenting) (agreeing with the Court that the interpretation of an arbitration agreement "raise[s] a question of federal law"). *Second*, it requires that any "ambiguities as to the scope of the arbitration clause itself [be] resolved in favor of arbitration."

Mastrobuono, 514 U.S. at 62 (internal quotation omitted). And *third*, it preempts the operation of state law that would thwart the operation of this federal substantive law of arbitrability. *See, e.g.*, *Mastrobuono*, 514 U.S. at 58 ("[T]he FAA ensures that [an arbitration] agreement will be enforced according to its terms *even if a rule of state law would otherwise exclude such claims from arbitration.*") (emphasis added); *see also Preston*, 128 S. Ct. at 982-89 (reversing state court decision invoking state law to deny arbitration); *Buckeye*, 546 U.S. at 443-49 (same); *Casarotto*, 517 U.S. at 683-88 (same).

Indeed, the FAA's federal substantive policy favoring arbitration *presupposes* that courts will enforce arbitration clauses according to their terms: because the statute requires courts to compel arbitration if there is even "doubt" on that score, *see, e.g.*, *Mitsubishi*, 473 U.S. at 626; *Moses H. Cone*, 460 U.S. at 24-25, it follows *a fortiori* that the statute requires courts to compel arbitration where (as here) there is no such doubt. The whole point of the statute, after all, is to overcome the traditional judicial hostility to arbitration by requiring courts to enforce arbitration provisions according to their terms. *See, e.g.*, *Volt*, 489 U.S. at 478-79; *Southland*, 465 U.S. at 10-16. If courts were free to thwart arbitration by giving arbitration provisions an artificially narrow interpretation under state law, the FAA would be entirely hortatory. This Court has not hesitated to grant review where state courts (including the Montana Supreme Court) have applied state law in a way that thwarts federal arbitration rights. *See, e.g.*, *Preston*, 128 S. Ct. at

982-89; *Buckeye*, 546 U.S. at 443-49; *Casarotto*, 517 U.S. at 683-88.

In this case, the Montana Supreme Court refused to apply the federal substantive law of arbitrability—or even to acknowledge its existence. By its plain terms, the MSA's arbitration provision requires arbitration of "[a]ny dispute, controversy or claim arising out of *or relating to* calculations performed by, or any determinations made by, the Independent Auditor." MSA § XI(c) (emphasis added). The Montana Supreme Court simply excised the italicized words from the MSA, and thereby converted a broad arbitration clause into a narrow one. *See, e.g.*, App. 24a (Rice, J., dissenting) (noting that the "related to" language makes this the "'paradigm of a broad clause'" and "'constitutes the broadest language the parties could reasonably use.'") (quoting *Fleet Tire Serv. of N. Little Rock v. Oliver Rubber Co.*, 118 F.3d 619, 621 (8th Cir. 1997), and citing *Collins & Aikman Prods. Co. v. Building Sys., Inc.*, 58 F.3d 16, 20 (2d Cir. 1995)). In addition, the Montana Supreme Court refused to give effect to the plain language specifying that "any dispute concerning the operation of any of the adjustments, reductions, offsets, carry-forwards, and allocations"—including the NPM Adjustment—*are* "related to" the Auditor's "calculations" and "determinations." MSA § XI(c).

Not surprisingly, until the decision below, the courts of *every other jurisdiction in the Nation* to have addressed this precise issue had held otherwise. Thus, Justice Rice opened his dissent by noting that "[c]ourts in 48 states, including the [Montana district court]" had "unanimously concluded" that the MSA

requires arbitration of disputes, like this one, over "diligent enforcement" under the MSA, along with all other issues related to the Auditor's determination to deny the NPM Adjustment. App. 21a. To wit:

Alabama: *Alabama v. Lorillard Tobacco Co.*, 1 So.3d 1 (Ala. 2008);

Alaska: *Alaska v. Philip Morris Inc.*, No. 1JU-97-915 CI, 2007 WL 6561051 (Alaska Super. Ct. Feb. 5, 2007);

Arizona: *Arizona v. Philip Morris Inc.*, No. 1CA-SA 07-0083 (Ariz. Ct. App. May 24, 2007);

Arkansas: *Arkansas v. American Tobacco Co.*, No. IJ1997-2982, 2006 WL 5400237 (Ark. Cir. Ct. Nov. 29, 2006), *pet. denied*, No. 07-17 (Ark. 2007);

California: *In re Tobacco Cases*, No. JCCP 4041 (Cal. Super. Ct. Aug. 23, 2006), *pet. denied*, No. JCCP 4041 (Cal. Ct. App. Dec. 5, 2006);

Colorado: *Colorado v. R.J. Reynolds Tobacco Co.*, No. 97 CV 3432 (Colo. Dist. Ct. July 19, 2006);

Connecticut: *Connecticut v. Philip Morris, Inc.*, 905 A.2d 42 (Conn. 2006);

Delaware: *Delaware v. Philip Morris USA, Inc.*, No. 657, 2006, 2007 WL 1138472 (Del. Apr. 17, 2007);

District of Columbia: *District of Columbia v. Philip Morris USA, Inc.*, No. 2006 CA 003176 B, 2006 WL 6273143 (D.C. Super. Ct. Sept. 26, 2006);

Georgia: *Georgia v. Philip Morris USA, Inc.*, No. 2006CV116128 (Ga. Super. Ct. Feb. 4, 2008);

Hawaii: *Hawaii v. Philip Morris USA*, No. 06-1-0695-04 KSSA (Haw. Cir. Ct. Aug. 2, 2006);

Idaho: *Idaho v. Philip Morris, Inc.*, No. CV OC 97 03239D, 2006 WL 5400238 (Idaho Dist. Ct. June 30, 2006), *leave to appeal denied*, No. 99567 (Idaho 2006);

Illinois: *Illinois v. Lorillard Tobacco Co.*, 865 N.E.2d 546 (Ill. App. Ct.), *appeal denied*, 875 N.E.2d 1119 (Ill. 2007);

Indiana: *Indiana v. Philip Morris Tobacco Co.*, 879 N.E.2d 1212 (Ind. Ct. App.), *transfer denied*, 898 N.E.2d 1217 (Ind. 2008);

Iowa: *Iowa v. Philip Morris USA, Inc.*, No. CL 71048, 2006 WL 5345156 (Iowa Dist. Ct. Aug. 16, 2006), *appeal dismissed*, No. 06-1486 (Iowa Feb. 16, 2007);

Kansas: *Kansas v. R.J. Reynolds Tobacco Co.*, No. 96-CV-919, 2007 WL 5416536 (Kan. Dist. Ct. July 9, 2007);

Kentucky: *Kentucky v. Brown & Williamson Tobacco Corp.*, 244 S.W.3d 116 (Ky. Ct. App. 2007), *review denied*, No. 2007-SC-0893-D (Ky. Feb. 13, 2008);

Louisiana: *Louisiana v. Philip Morris, USA, Inc.*, 982 So.2d 296 (La. Ct. App.), *writ denied*, 992 So.2d 942 (La. 2008);

Maine: *Maine v. Philip Morris, Inc.*, 928 A.2d 782 (Me. 2007);

Maryland: *Maryland v. Philip Morris Inc.*, 944 A.2d 1167 (Md. Ct. Spec. App.), *cert. denied*, 949 A.2d 653 (Md. 2008);

Massachusetts: *Massachusetts v. Philip Morris Inc.*, 864 N.E.2d 505 (Mass. 2007);

Michigan: *Michigan v. Philip Morris USA, Inc.*, No. 273665, 2007 WL 1651839 (Mich. Ct. App. June 7, 2007), *appeal denied*, 742 N.W.2d 118 (Mich. 2007);

Missouri: *Missouri v. American Tobacco Co.*, Inc., No. 22972-01465, 2007 WL 6509213 (Mo. Cir. Ct. Jan. 22, 2007);

Nebraska: *Nebraska v. R.J. Reynolds Tobacco Co.*, 746 N.W.2d 672 (Neb. 2008);

Nevada: *Nevada v. Philip Morris USA*, 199 P.3d 828 (Nev. 2009);

New Hampshire: *New Hampshire v. Philip Morris USA, Inc.*, 927 A.2d 503 (N.H. 2007);

New Jersey: *New Jersey v. Philip Morris USA, Inc.*, No. C-103-06, 2006 WL 6000399 (N.J. Super. Ct. 2006), *appeal denied*, No. 62,087 (N.J. Super. Ct. App. Div. Dec. 4, 2007);

New Mexico: *New Mexico v. American Tobacco Co.*, 194 P.3d 749 (N.M. Ct. App. 2008);

New York: *New York v. Philip Morris Inc.*, 838 N.Y.S.2d 460 (N.Y. 2007);

North Carolina: *North Carolina v. Philip Morris USA, Inc.*, 666 S.E.2d 783 (N.C. Ct. App. 2008), *writ denied*, 676 S.E.2d 54 (N.C. 2009);

North Dakota: *North Dakota v. Philip Morris, Inc.*, 732 N.W.2d 720 (N.D. 2007);

Ohio: *Ohio v. Philip Morris, Inc.*, No. 06AP-1012, 2008 WL 2854536 (Ohio Ct. App. July 24, 2008), *leave to appeal denied*, 898 N.E.2d 969 (Ohio 2008);

Oklahoma: *Oklahoma v. R.J. Reynolds Tobacco Co.*, No. CJ-96-1499, 2007 WL 6509215 (Okla. Dist. Ct. Jan. 29, 2007), *appeal dismissed*, No. 104,518 (Okla. 2007);

Oregon: *Oregon v. Philip Morris USA*, No. 0604-04252, 2006 WL 6273150 (Or. Cir. Ct. Aug. 29, 2006);

Pennsylvania: *Pennsylvania v. Philip Morris USA, Inc.*, No. 2443, 2006 WL 6288185 (Pa. Ct. Com. Pl. Dec. 12, 2006), *appeal denied*, 951 A.2d 265 (Pa. 2008);

Puerto Rico: *Puerto Rico v. Brown & Williamson*, No. 97-1910, 2007 WL 2844272 (D.P.R. Sept. 26, 2007);

Rhode Island: *Rhode Island v. Brown & Williamson Tobacco Corp.*, No. 97-3058, 2007 WL 1100077 (R.I. Super. Ct. Mar. 27, 2007);

South Carolina: *South Carolina v. Brown & Williamson Tobacco Corp.*, No. 97-CP-40-1686 (S.C. Ct. Com. Pl. Apr. 27, 2007);

South Dakota: *South Dakota v. R.J. Reynolds Tobacco Co.*, No. 06-161, 2006 WL 6273153 (S.D. Cir. Ct. Oct. 2, 2006), *appeal dismissed*, No. 24311 (S.D. Jan. 5, 2007);

Tennessee: *Tennessee v. Brown & Williamson Tobacco Corp.*, No. 98-3776-1, 2006 WL 5345521 (Tenn. Ch. Ct. Dec. 7, 2006), *leave to appeal denied*, No. M2007-00476-COA-R9-CV (Tenn. Ct. App. Mar. 16, 2007);

Utah: *Utah v. R.J. Reynolds Tobacco Co.*, No. 2:96-CV-0829 (Utah Dist. Ct. Dec. 15, 2006);

Vermont: *Vermont v. Philip Morris USA Inc.*, 945 A.2d 887 (Vt. 2008);

Virginia: *Virginia v. Brown & Williamson Tobacco Corp.*, No. HJ-2241, 2006 WL 6273154 (Va. Cir. Ct. Aug. 9, 2006), *leave to appeal denied*, No. 062245 (Va. Feb. 21, 2007);

Washington: *Washington v. Philip Morris USA*, No. 06-2-13262-9SEA, 2006 WL 6273155 (Wash. Super. Ct. Sept. 28, 2006), *appeal dismissed*, No. 59036-7-1, slip op. (Wash. Ct. App. Feb. 21, 2007);

West Virginia: *West Virginia v. American Tobacco Co.*, 681 S.E.2d 96 (W. Va. 2009);

Wisconsin: *Wisconsin v. Philip Morris Inc.*, No. 97-CV-0328, 2007 WL 6509259(Wis. Cir. Ct. Mar. 14, 2007);

Wyoming: *Wyoming v. Philip Morris USA Inc.*, No. 26718 (Wyo. Dist. Ct. Jan. 8, 2007).

The Montana Supreme Court majority shrugged off this unbroken line of authority as "not binding" and of "limited persuasive value." App. 19a. That is so, the majority declared, because "we are applying Montana law to the particular claims raised by the State in its motion for declaratory order." *Id.*; *see also* App. 17a ("[O]ur decision must be based on Montana law ...."); App. 29a ("[W]e are applying Montana's contract law to determine whether the parties agreed to arbitrate the present dispute."). The majority did not, and could not, explain *what* it is about "Montana law" that provides for a result different from that reached by every other court, or

how it could, consistent with the FAA, apply "Montana law" to override the plain terms of an arbitration agreement. Nor could or did the majority explain how its interpretation of the MSA's arbitration provision comported with the *federal* presumption in favor of arbitration. Indeed, the majority opinion below is written as if the FAA did not exist.

In particular, the Montana Supreme Court majority held that the MSA's arbitration provision applies *only* to challenges to the Auditor's specific "calculations" and "determinations." App. 12-16a. According to the majority, reading that provision to encompass any other disputes would "effectively nullify the limiting words 'calculations performed by, or any determinations made by' the Independent Auditor." App. 16a.

But, as every other court has recognized, that is a *non sequitur*. The whole point of the "related to" language is to extend the arbitration provision to disputes *beyond* those specifically challenging particular "calculations" or "determinations." A dispute over "diligent enforcement" necessarily "relates to" the Auditor's "calculations" and "determinations"; indeed, under the MSA, those are the *only* things to which "diligent enforcement" relates. *See* MSA § IX(d)(2)(B); *see also North Carolina*, 666 S.E.2d at 792-93; *Alabama*, 1 So.3d at 10; *Maryland*, 944 A.2d at 1176-78; *Indiana*, 879 N.E.2d at 1218; *New Hampshire*, 927 A.2d at 512; *Massachusetts*, 864 N.E.2d at 513.

Moreover, as other courts have again confirmed, the MSA underscores this broad arbitration requirement with language *specifically*

encompassing "any dispute concerning the operation or application of any of the adjustments, reductions, offsets, carry-forwards and allocations described in subsection IX(j)." MSA § XI(c). Subsection IX(j), in turn, specifies that the "the NPM Adjustment shall be applied ... pursuant to subsections IX(d)(1) and (d)(2)" in "calculat[ing]" the "payments due under this Agreement." MSA § IX(j). And subsection IX(d)(2) specifies that a State may avoid allocation of the NPM Adjustment by demonstrating that it has "diligently enforced" a Qualifying Statute. MSA § IX(d)(2). Accordingly, the MSA's arbitration provision *on its face* makes clear that a dispute concerning "diligent enforcement," along with all other disputes related to the Auditor's decision to deny the NPM Adjustment, is subject to arbitration. *See, e.g.*, *North Carolina*, 666 S.E.2d at 792; *New Mexico*, 194 P.3d at 754; *Louisiana*, 982 So.2d at 300; *Alabama*, 1 So.3d at 12; *Maryland*, 944 A.2d at 1177.

That is why the courts of the other 47 States and Territories to have addressed this precise issue have concluded that a dispute over "diligent enforcement" falls "clearly within the [MSA's] arbitration provision." *Connecticut*, 905 A.2d at 51; *see also Nevada*, 199 P.3d at 833 ("[U]nder the arbitration clause's clear language, disputes regarding diligent enforcement are subject to arbitration ...."); *Nebraska*, 746 N.W.2d at 680 ("[A] dispute regarding diligent enforcement is a dispute 'relating to' the independent auditor's calculations and therefore a dispute subject to arbitration."); *Alabama*, 1 So.3d at 8 ("[T]he clear and unambiguous language of the arbitration provision compels arbitration ...."); *Illinois*, 865 N.E.2d at 554 ("[T]he plain and unambiguous language of the MSA's arbitration

provision requires arbitration ...."); *Louisiana*, 982 So.2d at 300 (arbitration required "[i]n light of the clear and explicit language of Subsection XI(c)"); *Maryland*, 944 A.2d at 1175 ("MSA § XI(c) unambiguously requires arbitration."); *New Hampshire*, 927 A.2d at 514 ("[T]his dispute [over "diligent enforcement"] falls squarely under the arbitration provision of the MSA."); *Massachusetts*, 864 N.E.2d at 512 ("The language of the settlement agreement arbitration clause ... plainly and unambiguously encompasses the present dispute."); *New York*, 869 N.E.2d at 463 ("The plain language of the MSA compels arbitration."); *North Dakota*, 732 N.W.2d at 731 ("[T]he plain and unambiguous language of the settlement agreement requires arbitration of the parties' dispute ...."); *Vermont*, 945 A.2d at 895 (denying arbitration would be "contrary to both the [MSA's] spirit and the plain language"); *West Virginia*, 681 S.E.2d at 112 ("The plain and unambiguous terms and structure of the Master Settlement Agreement provide for arbitration of a diligent enforcement determination in a single, unitary proceeding involving all participants to the Master Settlement Agreement ...."). In particular, contrary to the Montana Supreme Court's assertion, "'there is nothing in the arbitration clause limiting arbitration to those questions actually determined'" by the Auditor. *North Dakota*, 732 N.W.2d at 728 (quoting *Massachusetts*, 864 N.E.2d at 513); *see also Alabama*, 1 So.3d at 10-11; *Illinois*, 865 N.E.2d at 553.

By refusing to enforce the MSA's arbitration provision according to its plain terms, the Montana Supreme Court deprived the parties of their federal arbitration rights. If this Court's repeated

admonition that "as a matter of *federal* law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," *Mitsubishi*, 473 U.S. at 626 (emphasis added), means anything, it means that this dispute is arbitrable as a matter of federal law. *See, e.g.*, *Alabama*, 1 So.3d at 7 (invoking the FAA in holding this dispute arbitrable); *Louisiana*, 982 So.2d at 301 (same); *Massachusetts*, 864 N.E.2d at 511 (same); *Maryland*, 944 A.2d at 1181-82 (same).

While a state court's refusal to enforce federal rights is troubling in any context, the Montana Supreme Court's refusal to enforce federal arbitration rights is particularly problematic in the context of a "landmark" agreement of "national effect and structure" like the MSA. *Reilly*, 533 U.S. at 533; *Indiana*, 879 N.E.2d at 1220; *see also West Virginia*, 681 S.E.2d at 109-12. In light of its nationwide payment structure, the MSA's payment provisions were designed to operate in a cohesive nationwide manner. Thus, "the agreement's broad referral to an arbitration panel of '[a]ny dispute, controversy or claim arising out of [or relating to]' the independent auditor's calculations or determinations reflects the necessity of creating a uniform, nationwide set of rules by which the independent auditor is to calculate the annual payments." *Connecticut*, 905 A.2d at 50; *see also Indiana*, 879 N.E.2d at 1219-20; *West Virginia*, 681 S.E.2d at 109-12; *Alabama*, 1 So.3d at 13-14.

If decisionmaking regarding payments and allocation under the MSA were balkanized among more than 50 state and territorial courts, the result would be "chaos" resulting from "potentially

conflicting decisions by multiple tribunals," which would "defeat[] the whole purpose" of the Agreement. *North Dakota*, 732 N.W.2d at 730 (internal quotation omitted). Submitting such disputes "to a neutral panel of competent arbitrators, who are guided by one clearly articulated set of rules that apply universally in a process where all parties can fully and effectively participate, obviates this problem and ensures fairness for all parties to the [MSA]." *Id.* (internal quotation omitted); *see also Massachusetts*, 864 N.E.2d at 512-13; *Vermont*, 945 A.2d at 894-95; *New Mexico*, 194 P.3d at 754-55.

The need for uniform nationwide adjudication is particularly compelling with respect to the MSA's "diligent enforcement" provision. Because that provision deals with the allocation of an NPM Adjustment among the States, each State has an obvious incentive to have that issue adjudicated in its own courts. At the same time, however, each State has an interest in the "diligent enforcement" determination with respect to every other State. "Because a diligent-enforcement determination as to one settling state will have an adverse impact on the remaining nonexempt settling states, it is essential that disputes regarding diligent enforcement be resolved in a national arbitration proceeding." *Alabama*, 1 So.3d at 13; *see also id.* ("Individual resolution of diligent-enforcement disputes in 52 separate state courts would involve the application of different standards in determining what activities constitute diligent enforcement and could lead to inconsistent and conflicting determinations on the issue."); *Nevada*, 199 P.3d at 834 ("The MSA's requirement that diligent enforcement disputes be arbitrated makes sense, given the inherently

national character of payment related disputes."); *Maryland*, 944 A.2d at 1180 ("In the case of diligent enforcement, a single decision-maker is vitally important ...."). In sum, "the NPM Adjustment and its inextricably linked defense of diligent enforcement have nationwide repercussions," *Indiana*, 879 N.E.2d at 1220, which is precisely why the MSA unambiguously assigned those issues to a single nationwide decisionmaker in the first place.

At bottom, however, this petition concerns not only the payment and allocation of billions of dollars under a landmark nationwide agreement, but the integrity and supremacy of federal law. Only this Court can correct the decision below, which flouts the FAA and turns the MSA on its head. And only this Court can remind state courts of their solemn obligation to enforce federal arbitration law, whether they like it or not. As this Court recently explained, "[g]iven the substantive supremacy of the FAA, but the Act's nonjurisdictional cast, state courts have a prominent role to play as enforcers of agreements to arbitrate." *Vaden v. Discover Bank*, 129 S. Ct. 1262, 1272 (2009). All of the other state courts understood and respected this obligation; only the Montana Supreme Court—ironically, the *last* of all the state courts to address this issue—did not.

If anything, this case only underscores the Montana Supreme Court's ongoing "war against arbitration." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 178 (2005). Even after this Court reversed the Montana

Supreme Court in *Casarotto*,[2] that court has continued to "express its hostility to arbitration," and has imposed "the regulation if not the prohibition of pre-dispute arbitration clauses in Montana." *Id.* at 178, 200 (citing, *inter alia*, *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 14 n.3 (Mont. 2002)); *see also* Bryan

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[2] In the Montana Supreme Court's decision in *Casarotto* itself, a specially concurring opinion declared that "people in the federal judiciary, especially at the appellate level," have "misinterpret[ed] congressional intent when it enacted the Federal Arbitration Act," and exhibited "arrogance" and "an intellectual detachment from reality," as well as "a self-serving disregard for the purposes for which courts exist," by letting "concern for their own crowded docket overcome their concern for the rights they are entrusted with," that federal FAA decisions constitute "insidious erosions of state authority and the judicial process" that "threaten to undermine the rule of law as we know it," that arbitration provisions "subvert our system of justice as we have come to know it," and that "[i]f any foreign government tried to do the same, we would surely consider it a serious act of aggression." *Casarotto v. Lombardi*, 886 P.2d 931, 939-41 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995), *on remand*, 901 P.2d 596 (Mont. 1995), *rev'd*, 517 U.S. 681 (1996).

Thereafter, on remand from this Court in *Casarotto*, two Justices of the Montana Supreme Court refused to sign the order vacating the court's judgment and allowing arbitration to proceed, in what has been described as "a final act of defiance at the federal authorities." Scott J. Burnham, *The War Against Arbitration in Montana*, 66 Mont. L. Rev. 139, 177 (2005). According to these Justices: "We cannot in good conscience be an instrument of a policy which is legally unfounded, socially detrimental and philosophically misguided as the United States Supreme Court's decision in this and other cases which interpret and apply the Federal Arbitration Act." Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, ABA J., Oct. 1996, at 16.

L. Quick, *Keystone, Inc. v. Triad Systems Corporation: Is The Montana Supreme Court Undermining The Federal Arbitration Act?*, 63 Mont. L. Rev. 445, 447 (2002) (discussing "how the Montana Supreme Court has contradicted the precedent established by the U.S. Supreme Court on the FAA," "contravene[d] the congressional intent and purpose of the FAA," and engaged in a "refusal to correctly apply the FAA to arbitration agreements"); Carroll E. Neesemann, *Montana Court Continues Its Hostility to Mandatory Arbitration*, 58-APR Disp. Resol. J. 22, 26 (2003) (noting that the Montana Supreme Court's decisions show that "the judicial animosity toward arbitration that prompted the passage of the FAA is still alive").[3]

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[3] At least one commentator has reported that Justice Nelson—the author of the decision below—"has been crisscrossing the state, presenting a Continuing Legal Education program in which he further elaborates on the standards the [Montana Supreme Court] has set" for the enforcement of arbitration clauses, and gives participants guidance regarding what they must do to "void [an] arbitration clause" consistent with that court's decisions. *War Against Arbitration*, 66 Mont. L. Rev. at 199. Based on a review of these materials, this commentator concluded: "The message seems to be: if you are so foolish as to think you can avoid the court system by putting an arbitration clause in your contract, think again." *Id.* at 200; *see also Martz v. Beneficial Mont., Inc.*, 135 P.3d 790, 796 (Mont. 2006) (Nelson, J., specially concurring) ("[T]he United States Supreme Court has, from the beginning, improperly conflated the Federal Arbitration Act (FAA) into something which Congress never intended it to be."); *id.* ("[U]nder the High Court's jurisprudence, the FAA and pre-dispute arbitration clauses in contracts of adhesion have now become little more than instruments of economic Darwinism by which predatory lenders ... and other large corporations victimize main-street

As one commentator recently observed, unless and until this Court intervenes, "arbitration is dead in Montana." *War Against Arbitration*, 66 Mont. L. Rev. at 200. Because the decision below is both clearly erroneous and pernicious, petitioners respectfully suggest that summary reversal is warranted. *See, e.g.*, *Presley v. Georgia*, 130 S. Ct. __, 2010 WL 154813 (U.S. Jan. 19, 2010) (*per curiam*); *Michigan v. Fisher*, 130 S. Ct. 546 (2009) (*per curiam*); *Porter v. McCollum*, 130 S. Ct. 447 (2009) (*per curiam*); *Wong v. Belmontes*, 130 S. Ct. 383 (2009) (*per curiam*); *Bobby v. Van Hook*, 130 S. Ct. 13 (2009) (*per curiam*); *Corcoran v. Levenhagen*, 130 S. Ct. 8 (2009) (*per curiam*). To leave the decision below undisturbed would be to send a decidedly negative signal about the enforcement of federal arbitration rights in state court.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari, and either summarily reverse the decision below or set the case for plenary consideration.

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businesses, the unsophisticated, the elderly, the poor, and what is left of the middle class."); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 14 n.3 (Mont. 2002) (Nelson, J., specially concurring for a majority of the Court) (urging that this Court's precedents holding that the FAA applies in state courts "should be overruled").

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